IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No.

MAURICE STECKLER, Administrator c. t. a. of the Estate of David Steckler, Deceased, &c.,

Petitioner,

against

THE PENNROAD CORPORATION, et al.,

Respondents.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court by Welsh, J., appears at pages 5 through 12 of the Record and is reported in 44 F. Supp. 800. The opinion of the United States Circuit Court of Appeals by Goodrich, C. J., appears at pages 65 through 76 of the Record and has not been reported.

Jurisdiction

The judgment sought to be reviewed was entered May 11, 1943 (R. 77).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

Statement of the Case

The essential facts of the case are fully stated in the accompanying petition (pp. 1-2).

Specification of Errors

The assigned errors to be urged are identical with the "Reasons for Granting the Writ" set forth in the accompanying petition.

ARGUMENT

I. The purchase and holding by Pennroad of more than 10% of the voting capital stock of Boston and Maine were in violation of Section 54(2) of the New York Public Service Law.

Section 54(2) of the Public Service Law is an absolute bar to the acquisition or retention of more than 10% of the voting capital stock of a railroad corporation "organized or existing under or by virtue of the laws" of New York. The courts below have held that said section has no application to the acquisition or retention of stock of a consolidated corporation organized under the laws of New York and other states.

A corporation resulting from the consolidation of several corporations organized under the laws of New York and other states is a domestic corporation in New York and in each of the other states. Such consolidated corporation is incorporated in duplicate or triplicate, as the case may be, in each of the charter states (*Matter of Cooley*, 186 N. Y. 220, 223, 224, 78 N. E. 939, 940 [1906]; *Attorney-General* v. *New York, New Haven and Hartford R. R. Co.*, 198 Mass. 413, 84 N. E. 737 [1908]).

A consolidated corporation is subject to regulation as a domestic corporation by each and every one of its charter states. Although a consolidated corporation may be bound only by the law of the charter state in which a purely local act is done, without reference to the laws of the other charter states, it is required to comply with the laws of each of the charter states with respect to an act affecting the corporation in its entirety.

As a consolidated corporation has but a single issue of capital stock representing all of its property everywhere, matters affecting its capital stock necessarily affect the corporation in its entirety. Thus it is that a consolidated corporation may not issue stock in violation of the laws of one of the charter states, although such issuance is otherwise proper under the laws of the other charter states (*Pollitz* v. *Wabash Railroad Co.*, 150 App. Div. 709, 135 N. Y. S. 785 [1912]; *Pollitz* v. *Wabash Railroad Co.*, 167 App. Div. 669, 152 N. Y. S. 803 [1915]; *Fisk* v. *Chicago, Rock Island and Pacific Railroad Co.*, 53 Barb. 513 [N. Y., 1868], unanimously affirmed by the General Term, see *O'Brien* v. *Chicago, Rock Island and Pacific Railroad Co.*, 36 How. Pr. 24 [N. Y., 1868]; *Attorney-General* v. *Boston and Maine Railroad*, 109 Mass. 99 [1871]). Likewise, the stock of a consolidated corporation may not be purchased in violation of the laws of one of the charter states (*Codman* v. *New York, New Haven & Hartford R. Co.*, 253 Mass. 144, 146, 150, 148 N. E. 467, 468 [1925]).

Similarly, a consolidated corporation is subject to restrictions imposed upon domestic corporations by one of its charter states (a) with respect to the issuance of bonds (*Pollitz* v. *Wabash Railroad Co.*, 167 App. Div. 669, 152 N. Y. S. 803 [1915]; *Brown* v. *Boston & Maine Railroad*, 233 Mass. 502, 124 N. E. 322 [1919]; *Pittsburgh & State Line R. R. Co.* v. *Rothschild*, 4 Central Reporter 107, 109, 8 Sadler 83, 88-90, Pa. Supreme Ct. [1886], aff'g *Rothschild* v. *Rochester & Pittsburgh R. R. Co.*, 1 Pa. County Rep. 620, 625-627); and (b) with respect to the

guarantee of bonds of another railroad (*Pollitz* v. *Utilities Commission of Ohio*, 96 Ohio St. 49, 117 N. E. 149 [1917]).

A consolidated railroad is possessed of the same privileges and is subject to the same duties as those conferred and imposed upon exclusively domestic corporations in respect to other types of statutes (*State ex rel. Leese* v. *Chicago, Burlington & Quincy Railroad Co.*, 25 Neb. 156, 41 N. W. 125 [1888]; *Patch* v. *Wabash Railroad Co.*, 207 U. S. 277, 284 [107]; *Boardman* v. *Lake Shore & Michigan Southern Ry. Co.*, 84 N. Y. 157, 185 [1881]; *Sprague* v. *Hartford, Providence & Fishkill R. R. Co.*, 5 R. I. 233, 234, 235 [1858]; *In re St. Paul & Northern Pacific Ry. Co.*, 36 Minn. 85, 86, 30 N. W. 432 [1886]).

The courts of New York, Massachusetts and other states have held that a corporation organized under the laws of several states is "organized or existing under or by virtue of the laws" of one of said states within the purview of a statute containing language similar to that of Section 54(2) of the Public Service Law (*Sage* v. *Lake Shore & Michigan Southern Ry. Co.*, 70 N. Y. 220, 222 [1877] ["any incorporated company in this state"]; *New York Central Railroad Co.* v. *Flynn*, 233 App. Div. 123, 126, 251 N. Y. S. 343, 346-347 [1931] ["a domestic railroad corporation"]; *Patch* v. *Wabash Railroad Co.*, 207 U. S. 277, 284 [1907] ["any railroad corporation now incorporated or hereafter to be incorporated by the laws of this state"]; *Peters* v. *Boston and Maine Railroad*, 114 Mass. 127, 131, 132 [1873] ["any railroad corporation created by this state"]; *Minot* v. *Philadelphia, Wilmington & Baltimore Railroad Co.*, 85 U. S. [18 Wall.] 206, 208 [1873] ["all railroad * * * companies incorporated under the laws of this state"]; *Northern Central Railway Co.* v. *Fidelity Trust Co.*, 152 Md. 94, 96, 136 Atl. 66, 67 [1927] ["any domestic * * * corporation"]).

In *Codman* v. *New York, New Haven & Hartford Railroad Co.*, 253 Mass. 144, 149, 148 N. E. 467, 469 (1925), the court stated that Chapter 585 of the Massachusetts Acts of 1907 (now Sec. 71 of Chap. 160 of the General

Laws of Massachusetts, Tercentenary Ed., 1932, Vol. II, p. 2044) prohibiting the acquisition of any shares of the stock of "any domestic railroad company" applied to the acquisition of the stock of the Boston and Maine Railroad, which at that time had been organized under the laws of Massachusetts, Maine and New Hampshire.

The New York Public Service Commission has consistently applied Section 54(2) to the purchase of stocks of consolidated corporations organized under the laws of New York and other states (*In the Matter of the Application of the New York Central & Hudson River Ry. Co.*, Case No. 4645 [1914], 4 Dec. Pub. Serv. Com., 2nd Dist., N. Y. 258; *Petition of Philadelphia & Reading Railway Co.*, N. Y. Pub. Serv. Com., Case No. 359 [1922], unreported). The Commission has similarly treated consolidated corporations as subject to the provisions of Section 55 of the same law regulating the issuance of stock by "a railroad corporation * * * organized or existing" under New York laws. (See *Annual Report of Public Service Commission of the State of New York, 1921*, pp. 30-31; *Annual Report of the Public Service Commission of the State of New York, 1922*, pp. 50-51; *Annual Report of the Public Service Commission of the State of New York, 1923*, p. 43.) The consistent practice of the Public Service Commission in treating consolidated corporations as "organized or existing" under New York laws within the scope of Section 54(2) is entitled to great weight (*New York, Chicago & St. Louis Railroad Co.* v. *Frank*, 314 U. S. 360 [1941]).

Furthermore, the court below erred in failing to find that Boston and Maine, by consolidating under Article 4, Sections 140-143, of the New York Railroad Law (Chap. 49 of the Consolidated Laws of 1910, c. 481), expressly subjected itself to the provisions of Section 54(2) of the Public Service Law.

Section 141 of the said Railroad Law provides in part that:

> "* * * such act of consolidation shall not release such new corporation from any of the restrictions,

liabilities or duties of the several corporations so consolidated."

The courts have enforced the obligation of consolidated corporations to conform to the laws of parent states where the consolidation was consummated pursuant to a statute similar to Section 141 of the New York Railroad Law (*People* v. *International Bridge Co.*, 223 N. Y. 137, 119 N. E. 351 [1918], aff'd in *International Bridge Co.* v. *New York*, 254 U. S. 126, 130 [1920]; *Ashley* v. *Ryan*, 153 U. S. 436 [1894]; *New York, Chicago & St. Louis R. Co.* v. *Frank*, 314 U. S. 360 [1941]; *People* v. *New York, Chicago & St. Louis R. Co.*, 129 N. Y. 474, 480 [1892]).

The Fitchburg Railroad Co., which was one of the constituent railroads which entered into the consolidation forming the present Boston and Maine was organized pursuant to New York Laws, 1869, c. 917, as the result of the consolidation in 1887 of the Troy and Boston Railroad Co., a strictly New York corporation, and the Fitchburg Railroad Co., a Massachusetts corporation. (See *Commercial and Financial Chronicle*, Vol. 44, p. 544; *Poor's Manual of Railroads*, 1888, pp. 32-33; *People* v. *Fitchburg Railroad Co.*, 61 Hun 619, 15 N. Y. S. 644 [1891].) By virtue of the provisions of the New York Railroad Law, quoted above, and its antecedent statutes containing identical provisions, the Fitchburg Railroad Co. and the present Boston and Maine both subjected themselves to the laws of the state of New York, including, of course, the restrictions of Section 54(2) of the New York Public Service Law.

The District Court predicated its opinion that Boston and Maine was not "organized or existing under or by virtue of the laws of" New York, within the purview of Section 54(2), upon certain New York tax cases (*People* v. *New York, Chicago & St. Louis Railroad Co.*, 129 N. Y. 474 [1892]; *New York Central Railroad Co.* v. *Flynn*, 233 App. Div. 123, 251 N. Y. S. 343, aff'd without opinion

257 N. Y. 553, 178 N. E. 791 [1931]). These cases have been held by the New York courts to be *sui generis* and an exception to the general rule applied by the same courts (*New York Central Railroad Co.* v. *Flynn, supra,* 233 App. Div. at p. 126, 251 N. Y. S. at p. 346; see also 15 *Fletcher, Cycl. of Private Corporations,* Sec. 7189, p. 291; *Cooley on Taxation,* 4th Ed., Vol. II, Sec. 797).

The Circuit Court of Appeals recognized this and stated (R. 70):

> "We do not think the tax cases are conclusive upon the point. They do show that for the purpose of taxation by New York, the New York courts do not treat the multiple corporation solely as a New York corporation. They thereby make what has seemed to the courts an equitable application of New York tax laws in view of the multi-state character of the multiple corporation.
>
> Other New York decisions, on varying facts, emphasize the domestic nature of the multiple corporation * * *."

The conclusion of the Circuit Court of Appeals as to whether Section 54(2) was applicable to consolidated corporations was that "we are not clear that the one quoted above (the statute under consideration) is applicable; it may be" (R. 71).

The Circuit Court of Appeals also referred to two other problems presented by the instant case: (a) whether the purchase by Pennroad of more than 10% of the stock of Boston and Maine was a complete nullity under the New York law; and (b) whether the prohibition of the New York law is effective in Pennsylvania as against the absence of a similar prohibition under the laws of other states in which Boston and Maine was also chartered (R. 72). Neither of these important questions was finally determined by the Circuit Court of Appeals, which chose to rest its opinion on other grounds. (See Points 2 and 3, *infra.*)

By the express provisions of Section 54(2), any purchase or transfer of stock in violation of said statute "shall be void and of no effect" and shall not be "recognized as effective for any purpose." The intent of the legislature is so plainly expressed as to leave no room for doubt. Such purchase or transfer has been held absolutely void (*Matter of Gilchrist,* 130 Misc. 456, 488, 224 N. Y. S. 210, 246 [1927]; *In re New York State Railways* [Case No. 6066], 1932, N. Y. Pub. Serv. Com. Rep. 416, 427, 428; *In re Schenectady Railway Co.* [Case No. 6068], 1930, N. Y. Pub. Serv. Com. Rep. 175, 185-186; cf. *Berkey* v. *Third Avenue Ry. Co.,* 244 N. Y. 84, 90, 155 N. E. 58, 59; *id.,* 244 N. Y. 602, 155 N. E. 914 [1926], per Cardozo, J.; see also *United Cigarette Machine Co., Inc.* v. *Canadian Pac. Ry. Co.,* 12 Fed. [2d] 634, C. C. A. 2d [1926]; *Dunbar* v. *American Telephone & Telegraph Co.,* 238 Ill. 456, 87 N. E. 521 [1909]; *Hall* v. *Woods,* 325 Ill. 114, 156 N. E. 258 [1927]; *Buckeye Marble & Freestone Co.* v. *Harvey,* 92 Tenn. 115, 20 S. W. 427 [1892]).

States other than those imposing restrictions relating to the stock of, or other corporate matters affecting, a consolidated corporation will enforce said restrictions. In *Pollitz* v. *Wabash Railroad Co.,* 150 App. Div. 709, 135 N. Y. S. 785 (1912), the plaintiff stockholders sought an injunction against the Wabash Railroad Co. enjoining the issuance of preferred stock. The Wabash Railroad was a consolidated corporation formed under the laws of Ohio, Michigan, Indiana, Illinois and Missouri. New York was not a charter state. The constitution of the state of Missouri, one of the charter states, prohibited the issuance of preferred stock except upon consent of *all* the stockholders. The defendants contended that the New York court should not recognize the Missouri restriction since a majority of the stockholders consented to the issuance and such consent was proper under the laws of the remaining charter states, including Ohio where the stockholders' meeting for obtaining consents was held. The court af-

firmed the issuance of the injunction. It said (150 App. Div. at 712, 135 N. Y. S. at 787):

> "Undoubtedly, the meeting, called in conformity with the laws of Ohio, was regular; but *the corporate acts had to conform to all the laws under which the corporation was empowered to act at all.*" (Italics ours.)

After trial of the same case the court affirmed a judgment against the directors of the Wabash Railroad for damages sustained by the company as a result of the "illegal, void and *ultra vires*" issuance of bonds contrary to statutes of three of the five charter states prohibiting the issuance of bonds except for money paid, labor done or property actually received (*Pollitz* v. *Wabash Railroad Co.*, 167 App. Div. 669, 685-686, 152 N. Y. S. 803, 813, 814-815 [1915]. See also *Fish* v. *Chicago, Rock Island and Pacific R. R. Co.*, 53 Barb. 513 [N. Y., 1868]; *Attorney General* v. *Boston and Maine Railroad*, 109 Mass. 99 [1871]; *Northern Central Railway Co.* v. *Fidelity Trust Co.*, 152 Md. 94, 136 Atl. 66 [1927]; *People* v. *International Bridge Co.*, 223 N. Y. 137, 119 N. E. 351 [1918], 254 U. S. 126 [1920]; *Vermont Valley Railroad Co.* v. *Connecticut River Power Co. of New Hampshire*, 99 Vt. 397, 133 Atl. [1926]).

It has been shown that a restriction upon the ownership of stock of a consolidated corporation by one of the parent states will be enforced, even though such ownership is not unlawful under the laws of other parent states (*Codman* v. *New York, New Haven & Hartford R. Co.*, 253 Mass. 144, 149, 148 N. E. 467, 469 [1925]). This necessarily follows since a consolidated corporation is defined as having "a capital stock which is a unit, and only one set of shareholders, who have an interest, by virtue of their ownership of shares of such stock, in all its property everywhere" (*Graham* v. *Boston, Hartford & Erie Railroad Co.*, 118 U. S. 161, 169 [1886]; *Matter of Cooley*, 186 N. Y. 220, 223-224 [1906]). Thus matters relating to the ownership and issuance of the stock of a consolidated corporation are matters affecting the corporation in its

entirety and of a nature requiring compliance with the laws of each of the charter states. Accordingly, if under the law of New York the ownership of stock of a consolidated corporation above a designated percentage is void and a nullity, such ownership must be void and a nullity everywhere.

II. A derivative action may be maintained against the directors of Pennroad to recover losses resulting from the violation of Section 54(2) of the Public Service Law of New York; the Public Service Commission is not the only one who may complain with respect to violations of said section.

The court below held that "the propriety of Pennroad's purchase of Boston and Maine stock is a matter to be raised by the Public Service Commission, if at all" (R. 74). This decision is predicated upon the erroneous assumption that the instant case is in the nature of a statutory action commenced under or pursuant to Section 54(2) of the Public Service Law of New York.

This action is not a statutory action or an action to enforce a penalty. It is a stockholder's suit in equity in the derivative right of Pennroad to enforce the latter's *common law right* to redress the wrongs done it by the individual defendants in breach of their fiduciary duties as directors. The wrongs complained of consist of the waste of corporate funds expended to purchase stock in violation of certain statutes and to which stock Pennroad, despite the expenditure of said funds, never acquired title.

The right of a stockholder to bring a suit, on behalf of the corporation, against directors to recover for losses sustained by the corporation as the result of an illegal or *ultra vires* act, where a demand upon the corporation to sue would be futile, requires no citation of authorities.

The unreported decision of *Gray* v. *Gill*, relied upon by the court below, is clearly distinguishable since the claim

asserted under the statute was not at common law for damages suffered by the plaintiff as the result of the violation of the statute. In so far as the statute was relied upon, the action was statutory. The case of *Kansas City, Southern Ry. Co.* v. *Chicago, Great Western R. Co.*, 58 F. (2d) 810 (N. D. Mo., 1932), is likewise distinguishable on similar grounds.

The contention that plaintiff may not bring this action because the statutes violated by Pennroad were not enacted for the benefit or protection of the class of which it is a member is without merit. A stockholder may unquestionably sue in the derivative right of a corporation to protect property of the corporation or to recover losses sustained by the corporation, even though the statute violated by the corporation was not enacted for the benefit or protection of the corporation (*Pearsall* v. *Great Northern Railway Co.*, 161 U. S. 646 [1896]; *DeKoven* v. *Lake Shore & M. S. Railway Co.*, 216 Fed. 955, 957-958 [D. C., S. D. N. Y., 1914]; *Venner* v. *New York Central & H. R. R. R. Co.*, 177 App. Div. 296, 343-344, 164 N. Y. S. 626, 657-658 [1917], affirmed in 226 N. Y. 583, 123 N. E. 893; *Di Tomasso* v. *Loverro*, 250 App. Div. 206, 293 N. Y. S. 912, affirmed in 276 N. Y. 551, 15 N. E. [2d] 570 [1937]; *Central Railroad Company* v. *Collins*, 40 Ga. 583, 628-629 [1869]). In such action he sues not upon the statute but in assertion of his common law right to protect or restore the property of the corporation of which he is a member.

III. Section 54(2) of the Public Service Law of New York is enforceable in a forum other than New York.

The court below concluded that claims arising under Section 54(2) of the Public Service Law of New York are not enforceable in a federal court in the Eastern District of Pennsylvania. The court held that said statute was concerned with "the governmental interests" (R. 75) of

the State of New York and its enforcement provisions "sound in terms of penal laws" (R. 76). This conclusion ignores the fact that this is a common law action against directors for losses suffered by the corporation, and that it is not a statutory action to enforce a penalty (see Point II, *supra*).

The courts of states other than those imposing statutory regulations relating to the stock of, or other corporate matters affecting, a consolidated corporation have enforced claims asserted by private individuals based upon violations of such statutes (*Pollitz* v. *Wabash R. Co.*, 167 App. Div. 669, 685-686, 152 N. Y. S. 803, 813, 814-815 [1915]; *Fisk* v. *Chicago, Rock Island and Pacific R. R. Co.*, 53 Barb. [N. Y., 1868] 513; *Northern Central Railway Co.* v. *Fidelity Trust Co.*, 152 Md. 94, 136 Atl. 66 [1927]; *Vermont Valley Railroad Co.* v. *Connecticut River Power Co. of N. H.*, 99 Vt. 397, 133 Atl. 367 [1926]). It matters not that the same statutes also impose penalties for the violation of their terms. The fact that the action of the directors in the instant case also constituted a crime does not preclude an action to make Pennroad whole for the losses suffered as a result of said illegal acts (*In re Debs*, 158 U. S. 564, 594 [1895]). An act is not less actionable as a tort because it may also be a misdemeanor (*Fidelity and Deposit Co.* v. *Grand National Bank*, 69 F. [2d] 177, 181 [C. C. A. 8, 1934]). Nor is an action based upon a loss, actually sustained by Pennroad, an action to enforce a penalty (*Brady* v. *Daly*, 175 U. S. 148, 154-155 [1899]; *Cockrill* v. *Cooper*, 86 Fed. 7, 12-13 C. C. A. 8, [1898]).

The court below further held that "even if the violation of the statute in question gave rise to private claims by individuals, in the manner discussed above, we do not think that they are the type of claims cognizable in another forum" (R. 76). The present action could be brought only where the individual defendants and the corporate defendant Pennroad could be served (cf. Section 51 of the Judicial Code, 28 U. S. C. A., par. 112). The individual defendants

in the instant case are residents of Pennsylvania and the defendant Pennroad can be sued in Pennsylvania by reason of the aforesaid statute. If the federal courts, despite the provisions of said statute, refuse to entertain litigation arising from the violation of statutes of other states than the forum in which the suit is brought, directors may violate the statutes of states other than those in which they reside with impunity, and the losses suffered by their corporation could not be recovered. We submit the present action was properly brought in the United States District Court for the Eastern District of Pennsylvania, and the losses suffered by Pennroad as a result of the illegal acts of the defendant directors are properly recoverable in this action. It was so held by the District Court on an earlier motion by the defendants to dismiss the complaint for lack of jurisdiction.

IV. The purchase and holding by Pennroad of more than 10% of the total capital stock of Boston and Maine were in violation of the laws of Massachusetts and ultra vires.

A

Unlike Section 54 of the Public Service Law of the state of New York, the prohibition contained in Section 5 of Chapter 156 of the General Laws of Massachusetts, quoted *supra,* Petition, page 3, is not made expressly applicable to foreign corporations.

Under well-settled rules of comity, however, and when said Massachusetts statute is read together with Section 2 of Chapter 181 of the Laws of Massachusetts, it becomes clear that the restrictions of said Section 5 of Chapter 156 are equally applicable to foreign corporations.

A foreign corporation may not do any act within a state repugnant to the laws or the declared public policy of said state (*American Law Institute: Restatement of the Law*

...ct of Laws, Sec. 165, comment b, c; *Commissioner ...ase Securities Corp.,* 298 Mass. 285, 10 N. E. [2d] 472, 491 [1937]; affirmed in 302 U. S. 660; *Pacific Wool Growers* v. *Commissioner of Corporations and Taxation,* 305 Mass. 197, 25 N. E. [2d] 208, 214 [1940]; *Claflin* v. *United States Credit System Company,* 165 Mass. 501, 43 N. E. 293 [1896]).

As a matter of conflict of laws, it is well settled that the holding of stock, as distinguished from the certificates of stock which are the evidence of ownership, constitutes an act done within the state of incorporation of the corporation whose stock is held, and is subject to the jurisdiction of that state (*American Law Institute: Restatement of the Law of Conflict of Laws,* Sec. 53, comment a). This is so because the situs of such shares is the state of incorporation of such corporation (*Morson* v. *Second National Bank of Boston,* 306 Mass. 588, 29 N. E. [2d] 19, 21 [1940]; 13 *American Jurisprudence,* Sec. 174, p. 300; *Beale, Conflict of Laws,* Vol. I, Sec. 104.1, pp. 446-448; *id.,* Vol. I, Sec. 118, c. 27, pp. 576-577). Boston and Maine was incorporated in Massachusetts (*Attorney-General* v. *New York, New Haven and Hartford Railroad Co.,* 198 Mass. 413, 84 N. E. 737 [1908]; *Peters* v. *Boston and Maine Railroad,* 114 Mass. 127 [1873]).

Not only under principles of comity, but also by the express provisions of Section 2 of Chapter 181 of the Massachusetts laws, quoted *supra,* Petition, page 3, is Pennroad, a foreign corporation, subject to the restrictions set forth in Section 5 of Chapter 156 of the said laws.

Statutes similar to Section 2 of Chapter 181 prohibiting foreign corporations from engaging in business prohibited to domestic corporations are not uncommon. Where, in addition to such statute, another statute prohibits domestic corporations from acquiring or holding stock in other domestic corporations, it is held that foreign corporations whose chief object is the acquisition and holding of stock are similarly prohibited from acquiring or holding stock in domestic corporations. In such case, the foreign hold-

ing corporation is said to be "doing business" within the state because the purchase and holding, far from being incidental activities, constitute the *principal business for which the corporation was organized,* since the profits derived therefrom are the profits for which the corporation was organized (20 *Corpus Juris Secundum, Corporations,* Sec. 1876, p. 97; *id.,* Sec. 1841, p. 61; 23 *American Jurisprudence, Sec.* 208, p. 187; *Coler* v. *Tacoma Ry. & Power Co.,* 65 N. J. Eq. 347, 351, 352, 54 Atl. 413, 414 [1903]; *Bankers Holding Corp.* v. *Maybury,* 161 Wash. 681, 297 Pac. 740 [1931]; *Central Life Securities Co.* v. *Smith,* 236 F. 170, 176 [C. C. A. 7, 1916]; *Southern Electric Securities Co.* v. *State,* 91 Miss. 195, 44 So. 785 [1907]; *Hall* v. *Woods,* 325 Ill. 114, 132-134, 142-144, 156 N. E. 258, 265-266, 269 [1927]).

The court below held that Section 5 of Chapter 156 was inapplicable to purchases by foreign corporations. It relied solely upon the authority of *Flynn* v. *Department of Public Utilities,* 302 Mass. 131, 18 N. E. (2d) 538 (1939). The *Flynn* case does not hold that a foreign corporation is not within the prohibition of Section 5 of Chapter 156. The only issue before the court was whether the Department of Public Utilities properly declined to exercise jurisdiction to investigate the sale and exchange of securities as between *two Massachusetts trusts.* The court sustained the Department's action.

No foreign corporation acquired or was intended to acquire any stock of a domestic public utility in the *Flynn* case, and, therefore, no question relating to a foreign corporation was before the court. This is clear from the decisions of the Department of Public Utilities (Complaint of H. Francis Flynn, Mass. Department of Public Utilities, Case No. 5331) and of the Supreme Judicial Court. The petitioner in the hearing before the Department charged, among other things, that a Delaware subsidiary corporation was a party to a contract whereby one Massachusetts trust was transferring to another Massachusetts trust, the Delaware corporation's parent, approximately 10½% of

the stock of a Massachusetts utility corporation. The Department expressly found, however, that the Delaware subsidiary was employed merely as an "instrumentality" or "conduit" in the transaction and not as the purchaser of the shares of the Massachusetts utility. It added that "the matter will be reported for judicial action if it is found to be otherwise upon further inquiry of the Department". Prior to the proceeding in the Supreme Court the transaction had been fully consummated and the stock had been acquired, not by the Delaware holding company, but by the Massachusetts voluntary trust association.

The court's statement that "only domestic corporations are forbidden to hold more than ten per cent of the stock of such a company" relates to the powers of a *Massachusetts voluntary trust* as contrasted with those of a *Massachusetts corporation* within the purview of Section 5 of Chapter 156. The court is very careful to define at length the full powers of supervision and investigation granted by the statutes to the Department with respect to the control by such domestic trusts of domestic public service companies (302 Mass. at pp. 133-135, 18 N. E. [2d] at pp. 540-541). No such powers of supervision and investigation exist with respect to foreign holding companies. They cannot conceivably have greater rights than domestic corporations or trusts. The very purpose of Section 2 of Chapter 181 and the long established public policy restricting stock ownership in, and unsupervised control of, Massachusetts public service companies permit no other conclusion.

B

The certificate of incorporation of Pennroad (Exhibit "A" annexed to the amended complaint), after setting forth the powers of the corporation, expressly provides that the exercise of such powers be subject to the following limitation:

> "* * * provided, however, that the Corporation shall not in any state, territory or country, carry on any business or exercise any powers, which a corporation organized under the laws of said state, territory or country could not carry on or exercise except to the extent permitted or authorized by the laws of such state, territory or country."

The language is clear and definite. This limitation upon the powers of Pennroad effectively places Pennroad under the same restrictions as a domestic corporation in any state where Pennroad carries on business or exercises such powers.

V. The New York and Massachusetts statutes under consideration are not superseded by the Transportation Act of 1920, as amended by the Act of June 16, 1933.

The defendants have argued that Section 5(4) of the Transportation Act of 1920, 49 U. S. C. A., Section 5, as amended by Act of June 16, 1933, c. 91, Section 202, Title II, 48 Stat. 217, 219, as amended, has superseded the New York and Massachusetts statutes under consideration. This contention was presumably adopted by the District Court below (R. 12).

The question raised is of first impression. Paragraph 15 of the same Section 5 of the said Act provides:

> "(15) The carriers and any corporation *affected by any order* made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws * * * and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, *insofar as may be necessary to enable them to do anything authorized or required by such order.*" (Italics ours.)

Congress by this provision carefully expressed its intention not to supersede all state laws regulating railroad and

holding company control of railroads. Until an order is entered by the Interstate Commerce Commission state laws control. Otherwise holding companies, like Pennroad, could continue their activities safely beyond the reach of both state and federal regulation.

Since there has been no order of the Interstate Commerce Commission entered under Section 5 authorizing Pennroad to acquire control of Boston and Maine, Pennroad remains subject to the prohibitions of Section 54(2) of the Public Service Law of the State of New York, and Section 5 of Chapter 156 of the Laws of Massachusetts.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

EMIL WEITZNER,
JAMES HOWARD MOLLOY,
Counsel for Petitioner.